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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

PHILIP H. SIMON,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit and Brief in Support Thereof.

ARTHUR GARFIELD HAYS,
Solicitor for Petitioner.

STEPHEN P. PIGA,
SIDNEY STRUBLE,
ELIAS MESSING,
Of Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

PHILIP H. SIMON,

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against

UNITED STATES OF AMERICA,

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Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Philip H. Simon, respectfully represents:

I. On May 7, 1940, the Grand Jury for the District of New Jersey found an indictment charging the petitioner, in one count, with violation of the Harrison Narcotic Act, 26 U. S. C. A. 2550 *et seq.*

II. On June 17, 1940, said petitioner was convicted in the United States District Court for New Jersey, after trial before the Honorable CHARLES C. WYCHE and a jury, on the single count of the aforesaid indictment. On June

18, 1940, the petitioner was sentenced to imprisonment for eighteen months.

III. The indictment charged the petitioner for an offense as follows:

> "As a physician who had duly registered and paid a special tax as required by the Harrison Narcotic Act, he did unlawfully, knowingly, feloniously and willingly sell, barter, exchange and give away to one Mildred McDermott on or about March 30, 1940, at Passaic, New Jersey, 163 one-quarter grain tablets of morphine, not in pursuance of any written order of the said Mildred McDermott on the form issued in blank for that purpose by the Commissioner of Internal Revenue of the United States, and not in good faith and not in the course of his professional practice only."

The conviction by the jury on the single count necessarily means that the jury found the petitioner guilty as charged in the indictment.

The defendant duly offered the opinion testimony of an expert medical witness, Dr. Rubin A. Gerber, to establish the medical character and symptoms of trigeminal neuralgia, for which defendant had been treating his patient, Mildred McDermott, and that morphine sulphate in the quantities prescribed and given to Mrs. McDermott were in accordance with approved medical practice. Among other things, Dr. Gerber testified that the defendant's "conduct" (in treating Mrs. McDermott) was that of an ethical practitioner (R. 11).

On cross-examination (R. 12-15) the prosecuting attorney, mistaking the purpose and effect of such testi-

mony, examined the witness regarding the defendant's "reputation" as an ethical practitioner, although the witness had not been called nor qualified as a character witness. In the course of such cross-examination, in the presence of the jury, the prosecuting attorney asked the witness:

> "*Do you know* whether or not he (defendant) had any previous police or criminal record in his community?" (R. 12) (Italics ours wherever they appear.)

Also,

> "*Doctor, would you be surprised to learn* that he (defendant) was charged in 1933 with the crime of conspiracy and that he (defendant) was charged in 1934 with having performed an abortion?" (R. 12).

While holding that Dr. Gerber was not offered as a character witness by the defendant (R. 37) nor duly qualified as such by the usual questions asked such a witness about to testify as to the defendant's character (R. 37), the Circuit Court held that the appellant put his "reputation" in issue by asking a direct question as to his "conduct" as a physician (R. 37). The jury, as the finders of the fact on the question of the ethical conduct of the doctor-defendant in diagnosing, prescribing and giving medicines to his patient, Mrs. McDermott, not only did not have the benefit of the clear direction of the Court to disregard the statements of the prosecuting attorney indicating previous charges of crime and arrest, but, even had such explicit direction been given to the jury, the effect of the particular statements and questions of the prosecuting attorney could not possibly, as a matter of law, have been erased from their minds. Upon objection by defend-

ant's counsel to the prosecuting attorney's above reference to an alleged prior arrest of the defendant as improper, the prosecuting attorney stated:

> "I admit on the question of the doctor's previous arrest I should not have shown * * *" (R. 13).

He was cut short by an objection of defendant's counsel, and the Court then said:

> "Gentlemen of the jury, you will disregard *that statement* of the United States Attorney and should not be guided by anything but the testimony in the case" (R. 13).

Immediately thereafter the jury retired from the court as directed and a colloquy ensued between counsel and the court.

The prosecuting attorney stated:

> "My question is whether or not he (witness Dr. Gerber) knew the doctor (defendant) was charged with conspiracy in 1933 and in 1934 was charged with having committed an abortion" (R. 14)

The defendant's attorney thereupon objected to the question and after discussion between the court and opposing counsel, the court ruled as follows:

> "I do not think that the question is proper, Mr. Smith (prosecuting attorney). Bring the jury back" (R. 14).

The jury returned, but were not advised by the court of its ruling as to the propriety of the question whether or not the witness, Dr. Gerber, knew that the defendant was charged with conspiracy and abortion.

IV. On the second day of the trial the jury retired for deliberation. In two and one-half hours the jury returned with the verdict of guilty. On the next day, June 18, 1940, the petitioner was sentenced to eighteen months imprisonment.

V. On September 24, 1940, the petitioner duly appealed from the aforesaid judgment of conviction to the United States Circuit Court of Appeals for the Third Circuit. On April 1, 1941, that court unanimously affirmed the conviction, an opinion being rendered by the Honorable JOHN BIGGS, JR., Circuit Judge. The opinion is printed in the record submitted herewith. (R. 33)

VI. Thereafter a petition for rehearing of said appeal was filed with the said Circuit Court of Appeals for the Third Circuit, which application was denied on the 16th day of May, 1941.

Statement of Jurisdiction.

The jurisdiction of this court is invoked under the provisions of Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (United States Code, Title 28, Section 347(a)).

Questions Presented.

The following are the questions presented by petitioner.

I.

Was it prejudicial error for the prosecuting attorney, in an endeavor to impeach an alleged character witness, to

suggest prior charges of crimes and arrests of defendant in the presence of the jury and inquire if he knew of them?

The opinion of the United States Circuit Court of Appeals, Third Circuit, sustains the right of the prosecuting attorney, in endeavoring to impeach a character witness to suggest prior charges of crimes and arrests of defendant and the right to ask if the witness knew of them. This right and practice is not in accord with the decisions of other Circuit Courts of Appeals. The decisions of such other Circuit Courts of Appeals are, as follows:

Stewart v. *U. S.*, 104 F. (2d) 234 (App. D. C. 1939);
Filippelli v. *U. S.*, 6 F. (2d) 121 (C. C. A. 9th, 1925);
Spalitto v. *U. S.*, 39 F. (2d) 782 (C. C. A. 8th, 1930);
Pittman v. *U. S.*, 42 F. (2d) 793 (C. C. A. 8th, 1930);
Sloan v. *U. S.*, 31 F. (2d) 902 (C. C. A. 8th, (1929).

II.

Do the United States Circuit Courts of Appeals have the power to consider and review errors committed in the trial of a criminal case, even though not reserved by objection or exception, so that justice may be done and the constitutional right of the defendant to a fair trial is assured?

In so far as the opinion of the United States Circuit Court of Appeals assumes the necessity of the making of

objections and exceptions to the trial court's ruling, as a condition precedent to the right of defendant to appeal from highly prejudicial error, it is in direct conflict with the decisions of this Court, its own decisions, and decisions of other Circuit Courts of Appeal in the following cases, among others:

Wiborg v. *U. S.*, 163 U. S. 632, 658 (1896);
Clyatt v. *U. S.*, 197 U. S. 207, 221 (1905);
Crawford v. *U. S.*, 212 U. S. 183, 194 (1909);
Weems v. *U. S.*, 217 U. S. 349, 362 (1910);
Brasfield et al v. *U. S.*, 272 U. S. 448, 450 (1926);
Savage v. *U. S.*, 213 Fed. 31, 32 (C. C. A. 8th, 1914);
Skuy v. *U. S.*, 261 Fed. 316, 320 (C. C. A. 8th, 1919);
De Jianne v. *U. S.*, 282 Fed. 737, 739 (C. C. A. 3rd, 1922);
Thompson v. *U. S.*, 283 Fed. 895, 896 (C. C. A. 3rd, 1922);
Ayres v. *U. S.*, 58 F. (2d) 607, 609 (C. C. A. 8th, 1932);
Towbin v. *U. S.*, 93 F. (2d) 861 (C. C. A. 10th, 1938);
Crabb et al v. *U. S.*, 99 F. (2d) 325, 326 (C. C. A. 10th, 1938);
Smith v. *U. S.*, 106 F. (2d) 726, 727 (C. C. A. 4th, 1939).

Reasons for Granting the Writ.

Your petitioner respectfully urges, as will be more fully argued in the brief accompanying this petition, the

following reasons why this application for a writ of certiorari should be granted:

1. The decision of the United States Circuit Court of Appeals, Third Circuit, sustaining the right of a prosecuting attorney to attempt to impeach a character witness by suggesting prior charges of crimes or arrests of the defendant and by inquiring if the witness had knowledge thereof, is in conflict with the decisions of other Circuit Courts of Appeals.

The Supreme Court has never specifically passed upon the question of the protection to be given defendants in criminal cases, from the effect of the type of questions complained of in the instant case. Since, in criminal cases, the life and liberty of the defendant is involved, it is of paramount importance to have a determination and clarification by this Court of the rules governing and defining permissible cross examination of character witnesses, to the end that such defendants shall receive a fair trial as guaranteed by the Constitution free from the vice inherent in the instant case.

2. The decision of the United States Circuit Court of Appeals, Third Circuit, is in conflict with decisions of this Court, other United States Circuit Courts of Appeals, and the same United States Circuit Court of Appeals, Third Circuit, in so far as it is based upon the assumption that it may not review, nor consider on an appeal to it, in a criminal case, highly prejudicial errors committed in the trial court, unless reserved by objection or exception.

It was in the interest of justice that this court in *Wiborg* v. *United States,* 163 U. S. 632, 653, alleviated the strictness of the former rule and practice, that no relief what-

ever might be granted by federal appellate courts, except on recorded objections or exceptions to rulings in the trial courts. The rule set forth therein recognizing the right and duty of the appeal courts to correct such prejudicial error, in criminal cases, though no formal objection or exception were taken, has been followed by this court, other Circuit Courts of Appeals, and even the Circuit Court of Appeals, Third Circuit. However, in the instant case, said Circuit Court of Appeals for the Third Circuit, has refused to recognize such power and duty to review. The conflict thus created should at this time, be dispelled by this court.

WHEREFORE, petitioner prays that a writ of certiorari may issue out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Third Circuit, commanding the said Court to certify and send to this Court for review and determination, as provided by law, this cause and a complete transcript of the record and of all proceedings had herein; and that the order of the said United States Circuit Court of Appeals, affirming the judgment in this cause, may be reversed, and that the petitioner may have such other and further relief in the premises as this Court may deem appropriate.

Dated: New York, N. Y., June 14, 1941.

PHILIP H. SIMON,
Petitioner.

By ARTHUR GARFIELD HAYS,
Solicitor for Petitioner.

Verification for the Petition.

UNITED STATES OF AMERICA

DISTRICT OF NEW JERSEY

PHILIP H. SIMON,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

PHILIP H. SIMON being duly sworn, says:

I am the petitioner herein. I have read the foregoing petition by me subscribed and know the contents thereof. The facts therein stated are true to the best of my knowledge, information and belief.

PHILIP H. SIMON.

Sworn to before me this
14th day of June, 1941.

FREDERICK GRIFFIN
Frederick Griffin

Notary Public, New York County
N. Y. Co. Clks. No. 346 Reg. No. 2G351
Kings Co. Clks. No. 169 Reg. No. 2254
Bronx Co. Clks. No. 45 Reg. No. 186G42
Queens Co. Clks. No. 811 Reg. No. 2523
Commission expires March 30, 1942

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

I hereby certify that I have examined the foregoing petition for a writ of certiorari and that in my opinion it is well founded and the cause is one in which the petition should be granted.

ARTHUR GARFIELD HAYS.

Sworn to before me this
14th day of June, 1941.

FREDERICK GRIFFIN
Frederick Griffin

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